IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 153 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASHOK C BAROT - Appellant
Versus
SATATE OF GUJARAT & 1 - Respondents

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Appearance :
MR MM TIRMIZI for Appellant:
MR MA PATEL, LD. APP for Respondent: 1,
NOTICE SERVED for Respondent: 2.

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 09/03/2007

ORAL JUDGMENT

1. The appellant original complainant has preferred this appeal under section 378 of the Code of Criminal Procedure, 1973 [herein after referred

to as the 'Code' for the sake of brevity] challenging the order of acquittal dated 12/10/1999 passed by learned Metropolitan Magistrate, Ahmedabad in Criminal Case No. 838 of 1997, acquitting the present respondent no.2 / original accused of the charge of committing offence punishable under section 138 of the Negotiable Instrument Act (herein after referred to as the "N.I. Act"). This Court [Coram: C.K. Buch, J] vide order dated 19/2/2002 admitted the appeal, noting that the leave was already granted on earlier occasion. This matter has been taken up for hearing today.

2. The facts in brief leading to filing of this appeal deserve to be set out as under:-

2.1 The appellant original complainant was constrained to file criminal complaint in the court of learned Metropolitan Magistrate against the respondent no.2 original accused on 24/4/1997 alleging that the complainant was working as Manager in the complainant private limited company located at Century Market, Kalupur, Ahmedabad. The complainant company was having business transaction with the accused/ respondent no.2 who used to purchase the commodities from the complainant company regularly. The complainant has alleged that the complainant company was maintaining the account and the details of commodities purchased by

accused were shown therein. The payment and outstanding amounts were also likewise shown in the books of accounts maintained by complainant company. The complainant stated that on 11/3/1997 a cheque of Rs.26,427=50 bearing no. 244565 drawn on Nutan Nagrik Bank, Rakhial Branch was issued by the respondent no.2 original accused to the complainant company with an assurance that the same would be honoured and the complainant would receive payment of the cheque amount. The complainant company deposited the said cheque in their account with the bank on 12/3/1997. Said cheque was in turn sent for clearance before the bank of the accused for encashment and the accused bank returned same with a memo dated 12/3/1997 that it was being returned on account of insufficiency of funds in the account of the drawer, that is the accused. This returning of cheque was intimated to the complainant company by their bank on 14/3/1997. As the cheque issued by the accused had been returned, the complainant issued notice through its advocate on 22/3/1997 by registered post A.D. The postal endorsement indicated that the same was refused. As the complainant did not receive its money for the cheque amount during the statutory period and after the notice, the complaint came to be filed on 24/4/1997. The plea of the accused came to be recorded and he came to be tried. After recording evidence, further statement of the accused came to be

recorded under section 313 of the Code wherein he denied the case of the prosecution and submitted that the blank cheque was misused by complainant company. The case of the complainant was denied in its totality by the accused. It appears that the questions were put by the court and it emerged therefrom that the complainant had played a mischief and seen to it that though the accused was at Bhuj at the relevant time the postal endorsement was made that he had refused to accept the notice.

3. The trial court after detailed discussions of the evidence on record has come to the conclusion that the complainant could not prove that the cheque was issued against any existing legal liability by the accused and therefore acquitted him vide its order dated 12/10/1999 which is impugned in this acquittal appeal.

4. Shri. Tirmizi,learned counsel appearing for the appellant has taken this Court through the complaint, testimony of the complainant, notice and other evidences on record. Shri. Tirmizi submitted that the complainant has established its case beyond reasonable doubt and therefore the trial court ought not to have acquitted the accused. Trial court erred in coming to the conclusion that the accused had not proved its case beyond reasonable doubt. Shri. Tirmizi submits that under provisions of Section 139 of

the Negotiable Instrument Act a duty is cast upon the accused to rebut the presumption that the cheque in fact had not been issued in discharge of any legal liability. Shri. Tirmizi has submitted that the trial court proceeded on a wrong footing that the complainant was required to make out a cast iron case and erroneously not formed the presumption which it requires to raise in view of the mandatory provision of Section 139 of the N.I. Act. Section 139 of the N.I. Act casts duty upon the court concerned to raise statutory presumption that the cheque in question had in fact been given for discharging the legal liability or debt on the part of the accused. The burden to prove that the cheque in question had not been given by the accused in discharge of any existing liability or debt is cast upon the accused and he is required to discharge it by leading cogent evidence. Shri. Tirmizi submitted that in the instant case looking to the record and evidence it can be said that the accused who has not examined himself failed in discharging his burden and therefore when the cheque is produced on record and it is established by the complainant that the accused failed in making payment against the cheque amount within the stipulated period, and when the accused could not discharge his burden that the cheque had not been issued against any liability or debt, the trial court ought to

have convicted him and punished him appropriately.

5. This Court has perused the records and evidences. Though served none appears on behalf of respondent no.2/ original accused. On perusal of the records & proceedings and evidence on record the following emerge :-

a) The complainant private limited company and the accused did have business transactions with each other;

b) The complainant company has unequivocally stated in its complaint that the complainant company was maintaining books of accounts wherein all the details of transactions outstanding of payments were mentioned. The details of payments received from the accused and outstanding remaining from the accused to the commodity were all mentioned in their books of accounts.

c)The notice at exhibit-8 dated 22/3/1997 issued on behalf of the complainant company through their advocate also go to show that the accused's account was maintained by the complainant company and the commodities taken on credit had also been reflected in their accounts, and the details of outstanding amount was also mentioned therein.

d) The complainant in its testimony also established that the company used to maintain account of the accused.

e) The complainant has admitted in cross examination that the last bill dated 26/3/1994 had remained unpaid and therefore total four cheques were received. He also admitted that the cheque in question had been given in respect of the bill no. 27484 dated 3/3/194. He also admitted that before having the notice issued he had himself checked books of accounts and he had shown willingness to produce books of accounts before the court. When the original bill and receipt of the complainant company had been shown to him during, his cross examination on behalf of the accused, he admitted that the receipt and bill were of his company which have been exhibited at exhibit-10 and 11. He has also unequivocally admitted that the receipt was for the money received in respect of the disputed bill amount against which the cheque was received. Though he denied that the blank cheque had been misused. He has also denied the suggestion that no cheque was given on 11/3/1997.

f) The bill at exhibit-11 go to show that it was bill no. 27484 and it is dated 3/3/1994. The amount shown is Rs.26427=50. Exhibit-10 is money

receipt duly stamped, issued by the complainant company in favour of the accused which bears same bill number and indicate that Rs.8260=00 is received against bill no. 27484 dated 3/3/1994 from the accused.

g) The trial court has therefore proceeded on the footing that the complainant can not be believed and therefore, benefit of doubt is given to the accused in its order of acquittal which is impugned in this appeal.

h) The complainant had not produced any books of accounts indicating the transactions with accused and payments of outstanding details.

6. Against the aforesaid backdrop, this Court is to examine whether the order of acquittal impugned in the present acquittal appeal is so perverse so as to result into miscarriage of justice. The answer is NO. It deserves to be noted that the memo of the complaint is absolutely silent in respect of any money received against the outstanding as it is established by the receipt at exhibit-10. The notice at exhibit-8 also do not disclose any money received and receipt issued by the company. In fact the notice and complaint have proceeded on the footing that there was total outstanding amount of Rs.27427=50 and against that, the cheque in question had been issued. It has also come out

on record that as per the allegations of the complainant company the outstanding of Rs.27,427=50 was of the year 1994 where against cheque was issued on 11/3/1997. Complainant's testimony coupled with his unequivocal admission in respect of bill at exhibit-11 and receipt at exhibit-10 and their silence about said receipt and money transaction in its complaint even in the statutory notice, the fact that the accused had come out with a defence that blank cheque was given and the case of the prosecution is false and that said blank cheque was misused go to show that, the accused did discharge the initial burden and therefore it was on the complainant to prove its case beyond reasonable doubt that the cheque in question was in fact issued by the accused in discharge of his existing debt or liability. As against this, the two documents at exhibit-10 and 11 namely receipt and the bill and the complainant's admission of the contents of the bill and his admission that the cheque in question was pertaining to the same very bill go to show that the accused did discharge his burden and thereafter the burden naturally shifted to the complainant to make out his case. The complainant failed in doing it and therefore the order of acquittal had been passed. It also deserves to be noted that the complainant has all along proceeded on the footing that the accused used to buy goods and commodities on

credit from the complainant and complainant used to maintain accounts. There was a specific question put to the complainant during his testimony about books of accounts and he had shown his willingness to produced the same. Therefore had there been a truth in the version of the complainant he would have certainly supported the same with the help of his books of accounts. The books of accounts would have brought out truth of transactions. The complainant has withheld a vital piece of evidence and therefore it can well be said that the production of the books of accounts would not have helped him and therefore they have not been produced by the complainant. Therefore drawing an adverse inference by the trial court is appreciated in the given facts and circumstances of the case.

7. The Apex Court in case of M.S. NARAYANA MENON ALIAS MANI V. STATE OF KERALA & ANR, reported in AIR 2006 S.C. pg. 3366 has held that, when it was the failure on the part of the complainant to discharge the burden which was shifted upon him, conviction was required to be set aside. In the case before the Apex Court the discrepancies were found in the books of accounts maintained by respondent original complainant which were produced for proving the transaction. In view of these facts the Apex Court observed that the defence of the accused that the cheque was

issued for the purpose of discounting was found to be probable and it was held that the accused discharged his initial burden and thereafter it was again shifted to the complainant to prove its case and in absence of any such cogent evidence the conviction was set aside.

8. In the instant case, as it is stated herein above, the complainant all along stated that the books of accounts were maintained keeping records of the commodities sold to the accused on credit. The books of accounts were examined before the complaint was filed by the complainant and he had shown willingness to produce the same on record. Yet when he was confronted with the bill at exhibit-10 it was his duty or the burden shifted upon him to make out a case explaining the correct facts. When the books of accounts have not been produced at all, the drawing of adverse inference was logical that the same would not have helped even, if produced by the complainant. In view of this, it can well be said that the decision of the trial court impugned in this appeal can not be said to be perverse so as to warrant any conviction.

9. In view of the aforesaid discussions, this Court is of the considered view that the order impugned does not call for any interference and the appeal therefore deserve to be dismissed and

is dismissed accordingly.

[S.R. BRAHMBHATT, J]

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